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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 SECURITIES AND EXCHANGE
4 COMMISSION,

5 Plaintiff,

6 v.

23 Civ. 2433 (ER)

7 JUSTIN SUN, TRON FOUNDATION
8 LIMITED, BITTORRENT FOUNDATION
9 LTD., RAINBERRY, INC., *et al.*,

Telephone Conference

10 Defendants.
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11 New York, N.Y.
12 March 14, 2024
13 11:30 a.m.

14 Before:

15 HON. EDGARDO RAMOS,

16 District Judge

17 APPEARANCES

18 U.S. SECURITIES AND EXCHANGE COMMISSION
19 Attorneys for Plaintiff
20 BY: TIMOTHY K. HALLORAN
21 ADAM B. GOTTLIEB

22 FENWICK & WEST LLP
23 Attorneys for Defendants
24 BY: JENNIFER BRETAN
25 REBECCA MATSUMURA
DEAN S. KRISTY
CASEY T. O'NEILL

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1 THE COURT: Good morning, everyone. This is Judge
2 Ramos.

3 Jazmin, please call the case.

4 THE DEPUTY CLERK: In the matter of the *Securities and*
5 *Exchange Commission v. Sun, et al.*

6 Counsel, please state your name for the record.
7 Starting with counsel for plaintiff.

8 MR. HALLORAN: Good morning, your Honor. This is
9 Timothy Halloran for the SEC and with me is my cocounsel Adam
10 Gottlieb.

11 THE DEPUTY CLERK: Counsel for defendants.

12 MS. BRETAN: Good morning, your Honor. This is
13 Jennifer Bretan of Fenwick & West. With me today are my
14 colleagues Dean Kristy, Casey O'Neill, and Rebecca Matsumura
15 for the Tron Foundation, BitTorrent Foundation, and Rainberry,
16 Inc.

17 THE COURT: Good morning to you all. This matter is
18 on for a conference. I note for the record that it is being
19 conducted by telephone. I know that we are here at the request
20 of one or more defendants. However, this is the first time
21 that the parties have appeared.

22 So, Mr. Halloran, let me begin with you. Why don't
23 you tell me a little bit about this case.

24 MR. HALLORAN: Yes, your Honor. So obviously at the
25 motion to dismiss stage, the allegations of the complaint must

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1 be deemed true and all inferences must be drawn in the
2 plaintiff's favor.

3 Applying that standard here, the complaint alleges
4 that Justin Sun and the three entity defendants that Mr. Sun
5 owns and controls, took actions aimed at the United States and
6 within the United States that violated the Federal Securities
7 Laws. And those actions included the marketing, offer, and
8 sale of unregistered crypto asset securities called TRX and BTT
9 to investors in the United States, the fraudulent wash trading
10 of TRX on a trading platform in the United States, directing a
11 campaign to pay celebrities in the United States to promote TRX
12 and BTT without disclosing that they had been paid, and then
13 lying to conceal the celebrity touting campaign.

14 Our complaint pleads these allegations in detail, your
15 Honor, and, therefore, based on the arguments in defendant's
16 premotion letter, we expect that any motion to dismiss will
17 fail.

18 THE COURT: Okay. And who is speaking on behalf of
19 the defendants? Is it Ms. Matsumura?

20 MS. BRETAN: It's me, your Honor. It's Jennifer
21 Bretan.

22 THE COURT: Okay. Ms. Bretan.

23 MS. BRETAN: Thank you, your Honor.

24 I hear Mr. Halloran's arguments, but I believe your
25 Honor is familiar with the nature of these cases. And we

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1 think, as we set out in our pre-conference papers, that there
2 are very different issues in this case and fundamental reasons
3 why the complaint as alleged has failed. I can walk through
4 them for your Honor, but it's a very different case than ones
5 that have come before it. And I believe the SEC relies very
6 heavily on cases like *Terraform* to carry some weight here.

7 When you scratch the surface of this complaint, you
8 get a lot of conclusory allegations about contacts with the
9 United States, about what any defendant did, etc. that really
10 do not meet the claims. So we are planning to make, first, as
11 to the three foreign defendants, significant jurisdictional
12 arguments that they shouldn't be in this court. When you look
13 at the claim, when you look at the claims and what's alleged
14 with respect to activity directed at the United States, it's a
15 very different looking case than any of the ones that have come
16 before it. And we think jurisdiction has not been established
17 as to the three foreign defendants on each of the claims.

18 The second infirmity here is it's very hard to tell
19 who did what. The complaint as stated relies on significantly
20 pleading things like, Mr. Sun on behalf of Tron Foundation,
21 BitTorrent Foundation, Rainberry, without any basis for making
22 the allegation or saying what any one of those persons or
23 entities did.

24 Unlike recent cases, we actually do think *Morrison*
25 applies here. And particularly where the conduct alleged here,

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1 predominantly, is foreign. And, I'd like to add, when you
2 scratch the surface of the complaint, there's very little to
3 support the claim that there was a concerted effort to market
4 to U.S. or U.S. investors.

5 Also make *Howie* arguments regarding the failure to
6 adequately plead that any digital asset offer sold here was
7 done to investment contract. When you review the complaint,
8 we're talking about things like social media context and
9 AirDrop where there's no investment of money in secondary
10 market trading, and we'll explain why, why we believe that the
11 secondary market trading alleged here doesn't satisfy *Howie*.

12 The wash trading allegations, just because they call
13 it wash trading does not mean it's wash trading, certainly
14 lacks specificity as to each defendant, and actually a logical
15 claim. We're talking about trades that are, you know,
16 fractions of a thousandth of a percent of all trading in the
17 token at issue, could not have conceivably had any impact on
18 market or induced purchases of sales.

19 And, finally, the touting claim I heard Mr. Halloran
20 say that are directed at the United States, but there really
21 aren't sufficient facts to show when you -- and we'll argue
22 this in our motion, that every defendant knew primary violation
23 and provided substantial assistance in a disclosure violation.
24 In fact, that's the only -- with respect to celebrity, the
25 secondary liability, the aiding and abetting claim, that's the

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1 only instance of a misstatement even alleged in the entirety of
2 the complaint. And we would argue, A, it's not sufficiently
3 alleged, and B, it's nonmaterial.

4 So, you know, we have other arguments. Your Honor, we
5 made a fair notice. We'll make a fair notice argument and a
6 major questions doctrine argument. In particular, when you
7 look at the kinds of claims made here about social media
8 context, tiny fraction, tiny amounts of token being awarded to
9 contest winners where it's very hard to oversee. It's very
10 hard to -- very hard to understand how anyone would have notice
11 of the types of claims that the SEC is pursuing here.

12 We saw in the response paper that, as I said, that the
13 SEC is going to rely heavily on Judge Rakoff's decision in
14 *Terraform*. That's a very, very different case. There are
15 extreme facts alleged there that are not even close to present
16 here. Failed institutional investors, hundreds of millions of
17 dollars in sales of potential investors in the U.S., loans to a
18 U.S. trading firm, significant misstatements about the use of
19 the coin, etc. I could you go on. And extensive contact with
20 the U.S. that are simply not here in this case.

21 So I'll stop there, your Honor. I'm happy to go on
22 further, but that gives you a bit of a flavor I hope of why we
23 think a motion to dismiss here both on the jurisdictional
24 grounds and on the substantive grounds will show that there's
25 not a basis to proceed.

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1 THE COURT: Let me ask you, Ms. Bretan, on the major
2 question doctrine, that's a fairly new animal and I've not had
3 occasion to deal with it. What is the basis for your major
4 question doctrine argument?

5 MS. BRETAN: The basis for the argument, your Honor --
6 and I recognize that courts have taken different views of this.
7 But when there's an issue that is affecting the economy in some
8 significant way, and where it's not quite clear that the issue
9 has been put to the agency here, the SEC, to regulate, Congress
10 really needs to step in and say what are the bounds of the
11 regulation, and that can't be up to the design of any regulator
12 as and when. And I know that Judge Rakoff disagreed in
13 *Terraform* that the major question doctrine is at issue in that
14 case.

15 But I don't think anyone can disagree that the
16 constant drumbeat on this issue from the whole hundreds of
17 members of Congress, disagreement among SEC commissioners and
18 even amongst agencies, suggest that it's a significant issue
19 with a significant impact on this economy. I can't open the
20 paper these days without reading about how the U.S. is falling
21 behind in an area of new technology, like Blockchain, given the
22 regulatory environment that my colleagues are pursuing and the
23 enforcement actions that my colleagues are pursuing. So your
24 Honor will have to open those arguments and see whether he
25 reads that someone like Judge Rakoff, maybe so. But we think

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1 there's enough here to say that it brings significant issues
2 that are in need of promotional action.

3 THE COURT: Even in this case where, as I understand
4 your argument at least in part, the impact of your clients'
5 activities here in the U.S. are de minimus? Again, as I think
6 is your argument.

7 MS. BRETAN: Yes, your Honor. But of course we're
8 making the jurisdictional arguments, but we're bringing all
9 arguments in that single motion. In the event your Honor finds
10 that -- and of course there's one defendant that's based in the
11 United States, although there is very little, if anything,
12 alleged about that defendant.

13 If your Honor finds the case goes forward, we think
14 that question will be squarely presented. And it's an
15 important question because apart from -- and the reason why
16 this case is proceeding like it is, is because there is a lack
17 of clarity around these issues. There's a lack of clarity
18 around things like who's regulating social media content or
19 giveaways. It's just not there, your Honor. So we do think
20 they're squarely presented here in the event.

21 THE COURT: Okay. Mr. Halloran, I'll give you an
22 opportunity to respond.

23 MR. HALLORAN: Yes, your Honor. Would you like me to
24 respond -- I'm prepared to respond to all of her arguments, or
25 would you like me to only address the major questions doctrine

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1 issue that you just raised?

2 THE COURT: Why don't you address each of the
3 arguments briefly.

4 MR. HALLORAN: All right. Will do.

5 So, your Honor, the first argument that they raised is
6 a personal jurisdiction. And as your Honor knows, personal
7 jurisdiction over the defendants requires two things: That the
8 defendant purposefully directed their activities at the United
9 States, and that the claims here arise out of or relate to the
10 defendants' actions. The complaint here alleges both of those
11 elements.

12 First, the defendants took multiple actions directed
13 at the United States, including marketing, offering, and
14 selling TRX and BTT to investors in the United States, having
15 TRX listed on a trading platform in the United States,
16 directing the wash trading of TRX on a trading platform in the
17 United States, and paying celebrities in the United States to
18 promote TRX and BTT to investors.

19 Second, the allegations of the complaint pretty
20 plainly arise directly out of and relate to those actions. As
21 noted in our premotion letter, your Honor, in the *Terraform*
22 case, Judge Rakoff addressed similar facts to those presented
23 here and he found that the Court had personal jurisdiction over
24 the defendants who were based in Singapore because they
25 promoted the digital assets at issue to investors in the United

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1 States. And for the same reasons, we believe that personal
2 jurisdiction over the defendant here is appropriate.

3 Moving on to group pleading, your Honor. The
4 defendants suggest that our using the phrase "Sun defendants"
5 in the complaint to refer to four defendants is impermissible
6 group pleading, but we disagree. The complaint alleges that
7 Mr. Sun owns and controls the Tron Foundation, the BitTorrent
8 Foundation, and Rainberry. So there's nothing improper or
9 confusing about referring to those specific defendants together
10 as the Sun defendants. And, your Honor, we submit that the
11 case law cited in our premotion letter, which we can certainly
12 expand on in full briefing, supports our position. We
13 certainly understand our pleading burden under Rules 9(b) and
14 12(b)(6) to put each defendant on notice of the claims against
15 them. And if the Court allows the parties to proceed to full
16 briefing, we will demonstrate that the complaint meets the
17 relevant standards.

18 Touching on extritoriality, your Honor, which was
19 their next argument, the allegations in the complaint here are
20 within the territorial bounds of the federal securities fraud.
21 Briefly, regarding the fraud claims in the complaint, Section
22 27B of the Exchange Act and the parallel provisions of the
23 Securities Act, cover both conduct within the United States in
24 furtherance of a violation, even if transactions occur
25 overseas, and conduct occurring outside the United States that

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1 has a foreseeable substantial effect within the United States.

2 So we believe there is no extraterritoriality problem
3 regarding the fraud claims, and the same is true for the
4 non-fraud claims in the complaint. In *Morrison*, the supreme
5 court held that the Exchange Act breached transactions in
6 securities listed on domestic exchanges and domestic
7 transactions in other securities. Here, we have both of the
8 *Morrison* prongs.

9 Regarding transactions in securities listed on
10 domestic exchanges, the complaint alleges that TRX, one of the
11 tokens, was listed, offered, and sold on a trading platform in
12 the United States. So the TRX transactions involve securities
13 listed on a domestic exchange. And regarding domestic
14 transactions in other securities, the complaint alleges that
15 BTT, the other token, was distributed to persons in the United
16 States, who in order to receive BTT, had to purchase and hold
17 TRX.

18 Under relevant law, which we'll certainly expand on in
19 briefing, including the Second Circuit's recent decision in
20 *Williams v. Binance*, we submit the BTT distributions are
21 domestic transactions subject to the Federal Securities Laws.

22 To touch on their next argument, your Honor, which was
23 an investment contract under the *Howie* test, the parties agree
24 that the *Howie* decision by the supreme court sets out what is
25 an investment contract, but we disagree on its application

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1 here.

2 The defendants make two arguments about why the crypto
3 asset securities here are not investment contracts under *Howie*.
4 First, they argue that people who receive TRX or BTT through
5 AirDrops or contests did not invest money under the *Howie* Test.
6 We disagree. As courts, including the Tenth Circuit have
7 explained, your Honor, and this is a quote, I'll give you the
8 cite. "Cash is not the only form of contribution or investment
9 that will create an investment contract. Instead, the
10 investment may take the form of goods and services or some
11 other exchange of value." That's the *Uselton* case,
12 U-S-E-L-T-O-N. 940 F.2d 564, 574, (10th Cir. 1991).

13 Here, your Honor, all of the offers and sales in the
14 complaint involve the investment of money or other valuable
15 consideration, such as promoting the Tron ecosystem online or
16 on social media and helping to create a market for the TRX and
17 BTT.

18 So we submit that the offers and sales alleged in the
19 complaint do involve an investment under *Howie* and they meet
20 the other prongs of the *Howie* test as well.

21 Defendants also argue that transactions on secondary
22 markets do not involve a reasonable expectation of profits
23 under the *Howie* test. That argument is based on Judge Torres'
24 opinion in *SEC v. Ripple*. And, your Honor, as we pointed out
25 in our premotion letter, in the *Terraform* decision, Judge

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1 Rakoff expressly rejected the reasoning of *Ripple*, and we'll
2 certainly expand on that in full briefing, your Honor. But we
3 submit that Judge Rakoff got it right in *Terraform* and this
4 court should follow his reasoning.

5 As to the next argument, your Honor, which is
6 particularity of the wash trading allegations, your Honor, we
7 respectfully submit that for the reasons set forth in our
8 premotion letter, the wash trading allegations in the complaint
9 are more than sufficient under Rule 9(b) and 12(b)(6). And I
10 don't want to belabor that point, your Honor, but we believe
11 they are pled with all the particularity, with all the rules
12 required in the case law.

13 Their next argument, your Honor, they make the
14 argument that we have not properly pled aiding and abetting the
15 touting violations in the complaint. We just don't believe
16 this is a persuasive argument at all, your Honor. As explained
17 in our premotion letter, the elements here are simple and
18 straightforward. On a motion to dismiss, they must be deemed
19 true, and for the reasons in our premotion letter, we believe
20 that we have pled each of the elements of the aiding and
21 abetting claim.

22 And, finally, as to the major questions argument, your
23 Honor, neither in their premotion letter nor during our
24 discussion here this morning has the defense pointed to any
25 case that would actually support their major questions doctrine

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1 as applied here, their major questions doctrine argument as
2 applied in this case. And, again, your Honor, in *Terraform*,
3 Judge Rakoff squarely addressed and rejected this exact
4 argument, and we believe that this Court should do the same.

5 So, your Honor, thank you for allowing me the
6 opportunity to address those arguments. I'm happy to answer
7 any questions about them. Otherwise, I'll stop here.

8 THE COURT: Okay. So what I'll do is I'll allow the
9 defendants to make the motion. I know that, Mr. Halloran, in
10 your December 28 letter you set forth an agreement or a
11 schedule on consent as to when the motion can be briefed.

12 Did you folks want to stay with that proposed
13 schedule, which has the initial motion being filed on March 28,
14 which is two weeks, the SEC's response on May 2, and the reply
15 on May 30. And we'll talk about the page limits in a second.

16 Did you folks want to stick with that schedule?
17 Mr. Halloran?

18 MR. HALLORAN: Yes, your Honor.

19 THE COURT: Ms. Bretan?

20 MS. BRETAN: Yes, your Honor.

21 THE COURT: Okay. So we'll adopt that. So the motion
22 will be due on March 28, the response will be due on May 2, and
23 the reply on May 30. I understand the parties have also
24 requested an expansion of the page limits to 50 pages for the
25 main briefs and 25 pages for the reply. Given the number of

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1 issues that are involved and the novelty of some of the issues
2 at least, I'll go and grant that request as well. So I'll add
3 those additional pages. Don't feel compelled to use them all
4 if you don't need to.

5 MS. BRETAN: We'll do our best, your Honor.

6 THE COURT: Now, with that, is there anything else
7 that we should do today? Mr. Halloran?

8 MR. HALLORAN: No, your Honor, not from our
9 perspective.

10 THE COURT: Ms. Bretan?

11 MS. BRETAN: No. Thank you very much, your Honor.

12 THE COURT: Okay. Well, in that event, we are
13 adjourned. Stay well and I look forward to receiving your
14 papers.

15 (Adjourned)

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